SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

I

This Court Should Review the Decision of the Majority of the Court Below in This Case That an Order of a District Court Remanding a Minor Dispute to the National

Railroad Adjustment Board (Hereinafter "NRAB"), or to a Public Law Board (Hereinafter "P. L. Board"), for Which Public Law 89-456 Provided, Is Not Subject to Appellate Review Because It Is Such an Important Question of First Impression in the Administration of the Railway Labor Act, Notwithstanding Respondent's Argument Based on the Fact That the Issues, as Between the Parties, Are Moot.

The importance of the question is evidenced by the fact that more than 2,988 awards per year have been made by the NRAB and P. L. Boards, since the enactment of P. L. 89-456, the Act of June 20, 1966, §§ 1, 2, 80 Stat. 208, 209, now 45 U. S. C. 153, First (m), (o), (p), (q), etc., and Section 153, Second, second paragraph (1970 Supp.). *National Mediation Board*, Thirty-Third Annual Report (1967), Table 9, p. 96; Thirty-Fourth Annual Report (1968), p. 44, Appendix A, pp. 54-60 and Table 9, p. 79 and Thirty-Fifth Annual Report (1969), p. 47, Appendix A, pp. 56-62, Table 9, p. 82. Prior to the enactment of Public Law 89-456 the NRAB made an average of some 1,180 awards per year. *Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-ninth Congress, First Session on H. R. 701, 704 and 706, Table 9, pp. 6-7 (1965); *Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, United States Senate, Eighty-ninth Congress, Second Session, p. 31 (1966).

Notwithstanding the state of the law for the 30 years prior to the enactment of P. L. 89-456 provided for judicial trial *de novo* of the merits of minor disputes and did not provide for judicial review of awards of the NRAB, *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (D. C. Cir. 1941), *aff'd by equally divided Court*, 319 U. S. 732

(1943), at least thirty-seven actions were commenced under subsection (p) of Section 3, First of the Act to enforce awards of the NRAB; in twenty-five of those cases the dispute was judicially reviewed on its merits, in twenty-three cases awards were denied enforcement and seven were enforced; *Hearings Before the Subcommittee of the House of Representatives, supra,* pp. 8-10 and *Hearings Before the Subcommittee of the Senate, supra,* pp. 22-23.

With the increased number of Awards by the NRAB and P. L. Boards since the enactment of P. L. 89-456, which denies judicial review of the merits of minor disputes but provides judicial review of awards not theretofore subject to review and jurisdiction to remand minor disputes to such boards, the correctness of the decision by a majority of the three Judges of the Court below in this case—that a decision of a District Court remanding a minor dispute to the NRAB or a P. L. Board is not subject to appellate review—reasonably may be expected to become increasingly important.

The increase in litigation since the decision of this Court in *Gunther v. San Diego & Eastern Arizona R. Co.*, 382 U. S. 257 (1965) and the enactment of P. L. 89-456 appears from *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 338 F. 2d 407 (10th Cir. 1964), *cert. denied*, 380 U. S. 972 (1965); *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 370 F. 2d 833 (10th Cir. 1966), *cert. denied*, 386 U. S. 1018 (1967); *Hanson v. Chesapeake & O. Ry.*, 198 F. Supp. 325 (S. D. W. Va. 1961), 236 F. Supp. 56 (S. D. W. Va. 1964), *aff'd*, 351 F. 2d 953 (4th Cir. 1965), *vacated and remanded*, 384 U. S. 211 (1966), *rev'd and remanded*, 367 F. 2d 134 (4th Cir. 1966), 291 F. Supp. 401 (S. D. W. Va. 1968), *vacated and remanded*, 412 F. 2d 631 (4th Cir. 1969); *Brotherhood*

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The decision by the Court below in this case—that a judgment of a District Court remanding a minor dispute to the NRAB is not subject to appellate review—is being relied upon by appellee in *United Transportation Union v. Illinois Central R. Co.*, No. 18,033 in the Court of Appeals for the Seventh Circuit, as noted at pp. 11-12 of the Petition in this case, which is awaiting argument and decision. It may also arise in *Gibson v. Missouri Pacific R. Co.* (E. D. Tex. No. 5176), *notice of appeal filed* July 16, 1970. Other District Courts have remanded minor disputes to the NRAB or P. L. Boards and apparently no appeal has been taken. *Brotherhood of Railway Signalmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, 284 F. Supp. 401 (N. D. Ill. 1968); *System Federation No. 30, etc. v. Braidwood*, 284 F. Supp. 611 (N. D. Ill. 1968); *Order of Railway Conductors & Brakemen v. Erie, Lackawana R. Co.*, 302 F. Supp. 1196 (N. D. Ohio, 1969).

The average number of cases arising since *Gunther* and P. L. 89-456 has thus been at least *three* per year, as compared to the average of *less than one* case per year arising during the 30 years preceding *Gunther* and P. L. 89-456. *Hearings Before the Subcommittee of the House of Representatives, supra*, pp. 8-10 and *Hearings Before the Subcommittee of the Senate, supra*, pp. 22-23.

II

Respondent's Argument That the Court Below Correctly Held That a Decision of a District Court Remanding a Minor Dispute to the NRAB or a P. L. Board, Is Not Subject to Appellate Review, Is Based Upon a Misconception of the Nature of an Action Under the Railway Labor Act to Enforce or Review Such Awards and Upon Inapposite Decisions.

Respondent's misconception of the nature of an action under the Railway Labor Act to enforce or review awards of the NRAB, like the misconception of the majority of the Court below, is evidenced by the decisions relied upon by the Court below (Ptn., p. A-19) and by Respondent (Br., pp. 10-12).

Respondent relies upon *Catlin v. United States*, 324 U. S. 229 and *Bohms v. Gardner*, 381 F. 2d 283 (8th Cir. 1967) as did the Court below (Ptn., p. A-19; Respondent's Br., pp. 10-11). The Court below also relied upon *Stathatos v. Arnold Bernstein S. S. Corp.*, 202 F. 2d 525 (2d Cir. 1953); *Marshall v. Celebreeze*, 351 F. 2d 467 (3d Cir. 1965); *Mayersky v. Celebreeze*, 353 F. 2d 89 (3d Cir. 1965); *Smith v. Sherman*, 349 F. 2d 547 (8th Cir. 1965); *Stewart v. Bishop*, 403 F. 2d 674 (8th Cir. 1968), (Ptn., p. A-19).

The *Catlin* case was an action for the condemnation of land under the War Purpose Act of August 18, 1890, and the Declaration of Taking Act of February 26, 1931, in which, on the same day the petition for condemnation was filed, the Court, upon the deposit by the Secretary of War of the estimated value of the land, entered an *ex parte* order vesting title to the land in the Government. This Court held that the *ex parte* order was not a final judgment subject to appellate review, since the question of

the sufficiency of the compensation for the land remained to be determined.

Stewart v. Bishop was a *habeas corpus* proceeding in which a majority of the Court below held it did not have jurisdiction of an appeal from an Order of a District Court directing a hearing by a State Court with respect to the voluntariness of a confession which had been used in a criminal case in the State Court, because no appeal had been taken from an order of the District Court dismissing the action after the State had complied with the interlocutory order for the voluntariness hearing.

Smith v. Sherman was an interpleader action for the determination of the respective interests of several persons in the assets of a defunct business, upon which the Trustee in bankruptcy also had asserted claims, in which the Court of Appeals held it was without jurisdiction of appeals from certain interlocutory orders, since there were still many unresolved issues in the interpleader action.

The *Marshall v. Celebreeze, Mayersky v. Celebreeze* and *Bohms v. Gardner* cases were based upon and subject to the Administrative Procedure Act, 5 USC 701-706, which is inapplicable to judicial review of arbitration awards under the Railway Labor Act. 5 USC Section 701 and *Brotherhood of Locomotive Firemen & Enginemen et al. v. Chicago, Burlington & Quincy R. Co. et al.*, 225 F. Supp. 11 (D. D. C. 1963), *aff'd on the opinion of the Court below, Brotherhood of Locomotive Firemen & Enginemen v. Certain Carriers*, 331 F. 2d 1020 (D. C. Cir. 1964), *cert. den.* 377 U. S. 918 (1964); in that case the Court considered the extent of judicial review under Section 9 of the Railway Labor Act, 45 USC 159, which is the extent of judicial review of awards of the NRAB and P. L. Boards which was intended under P. L. 89-456 (**2 U. S. Code Congressional & Administrative News**, 89th Congress, 2nd Session, 1966 at 2287).

The *Stathatos* case was an action for damages for an alleged breach of contract of which the District Court had initial jurisdiction. The contract contained a provision for the arbitration of disputes arising under it and was subject to the provisions of the United States Arbitration Act, 9 USC 1, et seq. (which, in terms, is not applicable to railroad employees, 9 USC 1, 2). The Court retained jurisdiction of the action, under the provisions of the Arbitration Act, to determine the validity of the arbitration of all or part of the issues which were subject to arbitration and for the resolution of any other issues not subject to arbitration.

Unlike cases such as *Stathatos*, Courts have never had initial original jurisdiction of minor disputes arising under collective agreements subject to the Railway Labor Act, such as the Court had of the dispute in *Stathatos* in which the contract provided for arbitration which was subject to the United States Arbitration Act, and continuing jurisdiction of the Court over the arbitration. Courts have never had initial original jurisdiction of minor disputes arising under the Railway Labor Act, notwithstanding such disputes are based on an alleged breach of a collective agreement and are subject to compulsory arbitration by the National Railroad Adjustment Board or Public Law Boards. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 724-728 (1945); *Order of Railway Conductors & Brakemen v. Pitney*, 326 U. S. 561, *rehearing denied*, 327 U. S. 814 (1946); *Slocum v. Delaware, L & W R. Co.*, 339 U. S. 239 (1950); *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255 (1950); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

Under the Railway Labor Act Courts have no initial original jurisdiction of any dispute which is subject to arbitration. Instead, under the Railway Labor Act Courts

have jurisdiction to determine the validity of arbitration awards only after such awards have been made either by the NRAB or by a P. L. Board under the provisions of Section 3, First, of the Railway Labor Act or by an arbitration board established under Sections 7, 8 and 9 of the Act. Arbitration, under the Railway Labor Act, is not, as in *Stathatos*, a method for resolving issues of which the Court otherwise had jurisdiction to try and determine.

Contrary to the opinion of the majority of the Court below and Respondent's argument (Br. 10-12), a decision of a District Court remanding a minor dispute to the NRAB or a P. L. Board, should be treated as a final judgment subject to appellate review under *Gillispie v. United States Steel Corp.*, 379 U. S. 148, 152-154 (1964) and *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962) because of the practical effect and consequences of such a decision, as shown in the petition and the last sentence of subsection (q) of Section 3, First, 45 U. S. C. 153, First (q) (1970 Supp.), which Respondent and the Court below practically ignore, and which obviously was enacted to insure that such a decision by a District Court would be subject to appellate review prior to permitting the practical consequences which would result from treating it as the Court below did and as Respondent argues should be permitted.

The only jurisdiction in addition to that which the Courts theretofore had and which was continued by P. L. 89-456 was jurisdiction to set aside such awards "in whole or in part" and "to remand the proceedings." In conferring such additional jurisdiction, P. L. 89-456 expressly provided (45 U. S. C. 153, First (p) and (q)) that the

> "..... district courts are empowered to enforce or set aside" [an award of the NRAB]

and that:

> "[t]he court shall have jurisdiction to affirm [the award], or to set it aside, *in whole or in part* or it may *remand* the proceeding" [to the Board] (emphasis supplied),

and further, that:

> "[t]he judgment of the Court shall be subject to review as provided in Sections 1291 and 1254 of Title 28."

CONCLUSION

For the reasons stated in the Petition and in this Reply Brief the writ of certiorari should be granted.

Respectfully submitted

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July 31, 1970